that self-defense negates such an allegation. *State v. Tuncle*, No. 38424 (8th Dist. Ohio Ct. of App., March 8, 1979) at 6-7 (Addendum 128-129);[17] and *State v. Simon*, No. 6262 (2nd Dist. Ohio Ct. of App., January 16, 1980) at 12-13 (Addendum at 118-119).[18]

It should therefore be clear that unlawfulness is an element of the crime which the state must prove beyond a

[17]There is some confusion as to the precedential stature of *Tuncle* engendered by the opinion of the Sixth Circuit in *Carter v. Jago*, 637 F. 2d 449, 456, n. 6 (6th Cir. 1980). An examination of *Carter* will reveal that the Court made three separate errors in its treatment of *Tuncle*.

First. The Court suggests that the *Tuncle* opinion was *dicta*. However, an examination of *Tuncle* (p. 4), indicats that the Court was treating the argument of the prosecutor that he "does not have to prove a lack of self-defense beyond a reasonable doubt."

Second. The Circuit Court indicates that *Tuncle* was "superseded" by *State v. Newell*, No. 40470 (8th Dist. Ohio Ct. App., March 13, 1980). But, even though the Eighth District Court of Appeals is a multi-judge, multi-panel (9 judges, 3 panels) District, there is no mechanism, short of a decision by the Supreme Court, by which decisions can be "superseded." One panel does not have the authority to overrule the decision of another.

Third. *Newell* was a case involving duress — not self-defense — and hence has no applicability to self-defense. The *Newell* panel seems to have recognize this fact since it neither cited nor discussed *Tuncle*.

[18]The *Simon* opinion reversed on two grounds, one for violation of the *ex post facto* clause and the second for constitutional reasons on the shifting of the burden of proof. Though conceding the propriety of the ruling on the first ground, the State moved for reconsideration on the secod ground. In response to that request, the Court issued a "Supplemental Opinion" on January 22, 1980 indicating that since it reversed on the first question, "the constitutionality of [Section 2901.05(A)] . . .is not at issue in this appeal and is in no posture for decision." (Addendum at 121). Cf. Ohio Appellate Rule 12.

Nevetheless, it is clear that the Court did not "withdraw" its prior opinion, nor forbid reference toit. Certainly the construction placed upon the statute by three respected judges is worthy of consideration in the absence of other controlling authority.

reasonable doubt. Yet, it is equally true that proof of self-defense necessarily negates this element of the crime. Ohio cases have uniformly recognized that proof of self-defense would negate the element of unlawfulness and utilize what is now an unconstitutional presumption to place the burden of proof on self-defense on the defendant. *E.g., Silvus v. State* 20 Ohio St. 90 (1871).[19] *See also, McElroy v. Holloway,* 632 F. 2d 605 (5th Cir. 1980), *cert. den.* 49 U.S.L.W. 3881 (1981); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds sub nom Hankerson v. North Carolina,* 432 U.S. 233 (1977); *Commonwealth v. Hilbert,* 382 A. 2d 724, 731 (Pa. 1978). Thus Constitutional error occurred when the court required these defendants to prove their innocence by disproving the unlawfulness element of the crime.

E. The State Cannot Constitutionally Make Actions Taken in Self-Defense a Crime

Because self-defense is inconsistent with criminal activity, the State can justify placing the burden of proof upon the accused *only* if it criminalizes actions taken in self-defense. Though the Ohio Attorney General has argued that the State has

[19]Petitioners have suggested that because self-defense has been denominated an "affirmative defense" its existence is "wholly collateral" to the elements of the crime. (Pets.' Brief at 18.) However, an examination of *State v. Silvus, supra* at 99 and 101 makes it clear tha proof of a killing raised a presumption of unlawfulness which self-defense rebutted. This presumption theory has been utilized in more modern cases, *e.g., State v. Robinson,* 161 Ohio St. 213, 118 N.E. 2d 517 (1954); *State v. Kinnemore,* 34 Ohio App. 2d 39, 295 N.E. 2d 680 (1972). In *State v. Humphries,* 51 Ohio St. 2d at 98, 364 N.E. 2d at 1357, *Silvus* is cited as authority for what the common law (pre-1974) rule was in Ohio with respect to the burden of proof on self-defense.

done this,[20] one should not lightly make this inference since the right to act in self-defense is protected by two separate provisions of the State Constitution.[21]

Moreover, any attempt by the State to criminalize self-defense would violate several provisions of the Federal Constitution. First, a command by the State that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd. For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[22] Second,

[20]In the District Court in Respondet Hughes' case, counsel for Mr. Engle argued:

> "The legislature has defined what act and what intent are required in order for a finding of *crime*. Since self-defense is a confession and an avoidance, the most that can be said is that the legislature did not intent to punish that which would otherwise be a crime." (Emphasis added.) "Respondents' Reply to Petitioner Hughes' Memorandum on the Merits" at 2. (Docketed: 6/25/79.)

[21]Article I, Section 1 of teh Ohio Constitution provides in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and *defending life . . .and* obtaining . . .*safety*. (Emphasis added.)

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense [sic] and *security . . .*" (Emphasis added.)

This latter provision is "intended to . . .afford the citizen [a] means for his defense of self and property." *State v. Hogan*, 63 Ohio St. 202, 219, 58 N.E. 572 (1900).

[22]IIIn *State v. Hardy*, 60 Ohio App. 2d 325, 329, 397 N.E. 2d 773, 776 (1978) the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his lifel . . .without due process of law. Obviously the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

to punish one whose only "crime" was to save his own life when attacked by a wrongdoer would be violative of the cruel and unusual punishment provision of the Eighth Amendment.[23]

Equally as important, the attempt to deprive the people of the "right" of self-defense by making such conduct criminal would deny them constitutional rights reserved and protected under both substantive due process under the Fourteenth Amendment and the Ninth Amendment. With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *quoted with approval*, *Patterson*, *supra* at 201-202. It should not be open to question that self-defense is such a right.

Historically, a homicide which resulted from an act taken in legitimate self-defense was justifiable and not unlawful. *Mullaney supra* at 692.

This right was also recognized in early Federal case law:

> "Where crime is committed with impunity . . .those unprotected by other sanctions . . .[are] compelled . . .to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security."

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[23]The Eight Amendment prohibits cruel and unusual punishment—including punishment that is disproportionate to the "offense." *Coker v. Georgia*, 433 U.S. 584 (1977). Punishment for *any* lawful act, including self-defense is both disproportionate and cruel and unusual. *See also Holloway v. McElroy*, 632 F. 2d 605, 627, and n. 35, and 636, n. 49, noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

United States v. Rhodes, 27 Fed. Cas. 785 (Cir. Ct. Ky.) (1866).[24]

See, e.g., Wallace v. United States, 162 U.S. 466 (1896).

As acknowledged by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense,therefore, as it is justly called *the primary law of nature*, so it is not, *neither can it be in fact, taken away by the law of society.*" *Reed v. State*, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Under the Ninth Amendment:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

To deny a citizen the right of self-defense would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," *Boyd v. United States*, 116 U.S. 616, 630 (1886). Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." *Stoffer v. State*, 14 Ohio St. 47, 53 (1864).

Accordingly, the State cannot justify placing the burden of proof on self-defense upon the accused under the theory that it has criminalized such conduct.

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[24]Compare Justice Rehnquist's opinion in *Coleman v. Balkcom*, ___ U.S. ___, 49 U.S.L.W. 3803, 3806 (June 15, 1981) (dissenting from denial of certiorari):

> "In Atlanta, we cannot protect our small children at play. In the Nation's Capitol, law enforcement authorities cannot protect the lives of employees of this very Court who live four blocks from the building in which we sit and deliberate the constitutionality of capital punishment." (Footnote omitted.)

IV.

WHEN THE BURDEN OF PROOF IS SHIFTED SO AS TO IMPAIR THE ACCURACY OF THE JURY'S VERDICT, THE FEDERAL COURTS ARE NOT POWERLESS TO CORRECT THE ERROR.

Petitioners assume, without discussion, that the *Sykes* procedural default rule is applicable to the cases at bar and proceed to argue that neither "cause" nor "prejudice" has been shown. However, a careful examination will reveal that: (A) the principles of *Sykes* are not applicable to cases such as the ones presently before the Court; (B) under the facts of these cases, any attempt to apply a contemporaneous objection rule would violate procedural due process, substantive due process, and equal protection as guaranteed under the Fourteenth Amendment; and (C) even if *Sykes* were applicable, both cause and prejudice have been demonstrated. For purposes of clarity, each of the points will be analyzed separately.

A. Sykes Is Not Applicable To the Cases Presently Before This Court

1. Jury instructions which erroneously place the burden of proof upon the accused constitute "plain constitutional error."

The contrast between the fundamental nature of the error in the case at bar and those cases in which this Court has held that a procedural default resulted in a forfeiture of a right to have a claim adjudicated on the merits is significant. Both *Davis v. United States*, 411 U.S. 233 (1973) and *Francis v. Henderson*, 425 U.S. 536 (1976) involved challenges to the compositions of the grand juries. As important as it is that

grand jurors be properly selected, the claim did "not in any way affect the determination of guilt or innocence, but allege(d) only a curable defect in the initiation of the proceeding." (Brief of the U.S. in *Davis* at 16.) In arguing for application of the rule in *Davis*, the United States specifically indicated that it did not argue that a rule could be adopted "barring collateral relief on all claims not timely asserted without regard to the effect of the alleged constitutional violation on a defendant's right to a fair trial. ." (Brief of the U.S. at 14). The United States stressed that the rule did not apply "to objections or defenses which go to the fairness of the guilt determining process . . ." (Brief of the U.S. at 15).

In *Estelle v. Williams*, 425 U.S. 501 (1979), this Court held that there was no violation of any constitutional right since there was no "compulsion" that the accused appear at trial in prison clothes. It was also noted that the appearance before a jury in prison clothes did not involve a "fundamental right", *Estelle, supra* at 508, n. 3, nor implicate the truth-finding function of the jury.

The situation was no different in *Sykes*. That case involved not a violation of the prohibition against coerced confessions but rather a violation of the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Solicitor General, in his *Amicus* Brief in *Sykes*, argued that there was a significant distinction between that case, where there was "no claim that the confession was involuntary and no suggestion that an innocent man may have been convicted" (*Amicus* Brief at 19) and the cases of *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Fay v. Noia*, 372 U.S. 391 (1963) where the rights involved "cut directly to the heart of the fairness of the trial proceedings." (*Amicus* Brief at 15.)

Respondent Bell submits that there is merit to the distinc-

tion which the Solicitor General drew in *Davis* and *Sykes*, even though the United States has taken a different position in the case at bar. In each of the cases from *Davis* to *Sykes*, the rights involved were not "fundamental." Indeed, in *Sykes*, Mr. Justice Stevens, is in his concurring opinion, observed that "there is clearly no basis for claiming that the trial violated any standard of fundamental fairness." *Id.* at 97. In none of those cases did the issue have a "bearing on the basic justice of his incarceration," *Stone v. Powell*, 428 U.S. 465, 491, n. 31 (1976), or the guilt/innocence determining process.

Here, the error related to the burden of proof upon the major issue under which the jury was to determine guilt or innocence. A proper instruction upon the burden of proof is fundamental to the truth-finding function of the jury. *e.g., Ivan v. New York*, 407 U.S. 203 (1972); *Hankerson v. North Carolina*, 432 U.S. 233 (1977). Consequently, the procedural default rule of *Sykes* should not apply.

Though the appropriateness of applying a constitutional plain error rule has not been decided by this Court, at least there Justices have indicated that such a standard might be appropriate. *Wainwright v. Sykes, supra* at 95 and 99 (Stevens, J., concurring and White, J., concurring); *Estelle v. Williams, supra* at 514, n. 2 (Powell, J., concurring). Such an approach would be consistent with this Court's power to review plain errors which were not challenged in the courts below if necessary to prevent "fundamental unfairness." *Wood v. Georgia,* U.S. , *49 U.S. L.W. 4218, 4219, n. 5 (1981). See also* Supreme Court Rule 34.1(a).

This plain error standard has been recognized by the lower courts in habeas corpus proceedings. *E.g., Carr v. Alabama*, 586 F. 2d 462, 465 (5th Cir. 1978). *See Williams v. Zahradnick*, 632 F. 2d 353, 360 (4th Cir. 1980). For

example, *Berrier v. Egeler*, 428 F. Supp. 750 (E.D. Mich. 1976), *aff'd* 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 95 (1978), involved an unobjected-to erroneous jury instruction on the issue of self-defense. The District Court found the shifting of the burden of proof to be "plain constitutional error." 428 F. Supp. at 752. On appeal the Sixth Circuit reviewed the issue under "plain error" precisely because the claim touched upon "the central issue of guilt or innocence." 583 F. 2d at 522.

This seems to be the very point Judge Celebrezze made in the panel decision below:

> "...denying to a defendant a trial under what the Ohio Supreme Court has concluded to be the proper allocation of the burden of proof amounts to a denial of due process." 646 F. 2d at 1129 (A. 34).

If a constitutional plain error standard is applied then a number of factors coalesce to indicate that this is a proper case to grant relief. First, the right to have the state prove guilt beyond a reasonable doubt and not to be required to prove one's innocence is a fundamental right of the highest order. *E.g., In re Winship, supra,* and *Hankerson v. North Carolina, supra.* Second, the error here directly affected the jury's ability to accurately determine whether the accused was innocent or guilty. Third, the error is shifting the burden of proof was one of commission and not simply ommission. *Compare Sandstrom v. Montana, supra* with *Henderson v. Kibbe,* 431 U.S. 145 (1977). Fourth, the State of Ohio, by statute, had specifically placed upon the trial court the duty of giving proper instructions to the jury. See R.C. 2945.11. Fifth, there was no conceivable benefit to the defendants in not objecting to the jury instructions. With all these factors combined, if there is no "plain constitutional error" here, then none can ever be said to exist.

2. Petitioner Perini's Failure to Create a Record and Waiver of the Sykes Defense

a. The Record is Inadequate to Support a Sykes Defense.

Rule 5 of the Rules Governing Section 2254 cases states:

> ". . . There *shall* be attached to the answer such portions of the transcript as the answering party deems relevant." (Emphasis added.)

Mr. Perini failed to make any portion of the transcript of Mr. Bell's trial a part of the record in the District Court. (Decision of District Court, A. 51, n. 3; Pets.' Brief at 6, n. 4.) Consequently, there is nothing in the record to demonstrate Petitioners' claim that Respondent Bell's trial counsel failed to object to the improper jury instruction.

Each party to an action bears the burden of making a proper record to support its claim. *E.g., Thompson v. Gaffney*, 540 F. 2d 251 (6th Cir. 1976). As the Eighth Circuit has concluded:

> "The burden of pleading and proving waiver of these constitutional claims falls on the government. (Citations omitted) Because a finding of waiver bars even a meritorious claim for habeas corpus relief, the government's burden is a heavy one." *Wilwording v. Swenson*, 502 F. 2d 844, 849 (8th Cir. 1974).

Accord, In re Kravitz, 488 F. Supp. 38, 46 (M.D. Pa. 1979) (burden on custodian to make record on claimed procedural default).

Further, a reviewing court should not pass upon issues for which there is no support in the record. *See, e.g., Johnson v. Henderson*, 509 F. 2d 121, 122 (5th Cir. 1975). The Ninth Circuit has emphasized that "(a)n allegation in an appellate brief does not substitute for the necessary pleadings in a Section

2254 proceeding." *Wacht v. Cardwell*, 604 F. 2d 1245, 1247 (9th Cir. 1979). Nor can Appellate Rule 10(e) be utilized to submit documentary materials to the Court of Appeals which were not made part of the record in the District Court. *E.g., United States, ex rel. Kellogg v. McBee*, 452 F. 2d 134 (7th Cir. 1971); *Collins v. Wilson*, 368 F. 2d 995, 997 (9th Cir. 1966).

Having failed to support his factual predicate for his *Sykes* defense, Mr. Perini is barred from asserting that claim.

b. Waiver of the Sykes Defense

As set forth in the Statement of the Case, the *Sykes* claim was never raised in the District Court and was raised for the first time in Mr. Perini's Answer Brief in the Sixth Circuit Court of Appeals. It is well-established that generally a reviewing court should not consider an issue not raised below. *E.g.., Singleton v. Wulff*, 428 U.S. 106, 120 (1976).[25] The Ninth Circuit explained the reason for the rule was that:

> ". . . It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below." *Partenweederei, Ms. Belgrano v. Weigel*, 313 F. 2d 423, 425 (9th Cir. 1962).

It is clear that this rule applies to the Government as well as to habeas corpus petitioners. *E.g., Robinson v. Berman*, 594 F. 2d 1, 3 (1st Cir. 1979); *Hopkins v. Jarvis*, 648 F. 2d 981, 983, n.

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[25]Obviously, this rule will allow for an exception in the case of a manifest injustice. For example, where a District Court ruling properly relies upon a state Supreme Court decision, the Circuit Court may reverse where the state Supreme Court ruling is overruled during the pendency of the appeal. *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

2 (5th Cir. 1981); and *Messelt v. State of Alabama*, 595 F. 2d 247 (5th Cir. 1979).

This view accords with the applicable rules of procedure. Rule 11 of the Rules Governing Section 2254 proceedings incorporates the Federal Rules of Civil Procedure where applicable and not inconsistent. Rule 8(c) of the Federal Rules of Civil Procedure requires that the answering party "shall set forth affirmatively" all affirmative defenses, including the defense of "waiver". The failure to so plead is considered a bar to the right to assert the defense. See *West's* Federal Practice Manual, Section 7975 (1979).[26]

Recent decisions by this Court also support this view. For example, in *Jenkins v. Anderson*, 447 U.S. 231 (1980), this Court refused to consider a *Sykes* claim where the respondent failed to raise it in either the district court or the court of appeals. This refusal was based upon considerations of "judicial efficiency" since a determination of *Sykes* issues may turn upon factual findings on questions of state law, *Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980).

In *Estelle v. Smith*, ____ U.S. ____, 68 L. Ed. 2d 359, 372, n. 12 (1981), this Court rejected the government's attempt to raise the claims where it was first raised in a motion for new trial before the District Court. In so doing, this Court adopted the reasoning of the Fifth Circuit, which included the following:

> "(I)n the habeas proceeding in federal district court, the state did not raise this argument in the pleading or at any time until it moved for a new trial. Judge Porter held that this constituted a waiver, see *Smith v. Estelle*, 445 F. Supp. 647, 659 (N.D. Tex. 1977), and we are not disposed to disagree." *Smith v. Estelle*, 602 F. 2d 694, 708, n. 19 (5th Cir. 1979).

[26]Appellate courts generally will not consider even claims raised for the first time in a reply brief in the District Court. *See e.g., Jennings v. Casscles*, 568 F. 2d 229, 233-34 (2nd Cir. 1977); and *McKinney v. Wainwright*, 488 F. 2d 28, 29, n. 1 (5th Cir. 1974). *See also Reinhart v. Brewer*, 561 F. 2d 126, 129 (8th Cir. 1977).

These principles apply *a fortiori* in Mr. Bell's case and should bar an application of *Sykes* to his case.

3. The Inadequacy of the State Grounds

The existence of a state "contemporaneous objection rule" does not, in and of itself, preclude consideration of an unobjected-to error under *Sykes*. Rather, a determination must be made as to the "adequacy" of the asserted state grounds. *Sykes, supra* at 78-79. In resolving that question in *Sykes*, the Court cited *Henry v. Mississippi*, 379 U.S. 443 (1965) for the proposition that a state procedural rule could be an adequate and independent state ground only if "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.* at 83, n. 8. *See also Ulster County Court v. Allen*, 442 U.S. 140 (1979).

The "adequacy" of the alleged independent ground is a matter of federal law. *E.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458 (1958); *Sykes, supra* at 88. Further, the inquiry into the adequacy of the state grounds must be made on an individual basis:

> "In *every case* we must inquie whether the enforcement of a procedural forfeiture serves such a state interest." *Henry, supra* at 447. (Emphasis added)

This requirement has been followed by the post-*Sykes* decisions of the lower courts:

> ". . . our cases make it clear that we cannot simply consider the (contemporaneous objection) rule in general, or in the abstract; we must see how it operates in the particular case before us." *Jurek v. Estelle*, 593 F. 2d 672, 683 (5th Cir. 1979) (Footnote omitted)

Application of these principles to the case at bar indicates that there are two separate and independent reasons why the state's

interest in these cases is inadequate to legitimize the preclusion of these claims from consideration by the federal courts.

FIRST. The State cannot "avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support." *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). *See also Williams v. Georgia*, 349 U.S. 375 (1955).

In this case, as in *Williams, supra*, Ohio has sought to establish a bar to federal review where its own courts are not barred from considering the issue. In *Williams*, this Court dealt with the Georgia Courts' refusal to hear an extraordinary motion for new trial. The issue sought to be raised by that motion had *not* been raised on direct review. Nonetheless, because this Court found that Georgia appellate courts had, in the past, heard "kindred issues raised in the same manner" (*Williams* at 383), the Court determined that it, too, had the jurisdiction to consider the substantive issue.

This type of analysis most recently used by the Court in *Ulster County, supra*, attests to the continuing vitality of *Williams*. The *Williams* analysis is applicable to this case even though *Williams* was on direct review. Whether a case is on direct or collateral review, the initial question must always be whether an independent and adequate state ground forecloses federal consideration of the claim.

In *Williams*, the Court focused, through an analysis of Georgia appellate cases,[27] on situations where the courts had granted review. These decisions revealed two common factors. First, in each instance, although presenting different substantive issues, the error was covered by a "contemporaneous

[27]It is interesting to note that *Williams* was concerned with the power of Georgia *Appellate* Courts to consider the substantive issue. The question was whether any Georgia court had exercised the discretionary power. *See Williams, supra* at 384-388.

objection rule." *Williams* at 384-388. Thus, the State's interest in mandating compliance with this procedural rule was the same. Second, the decisions revealed that the Georgia courts "possessed the power" to grant the motions in each instance. This Court reasoned that if the same interests existed in all of the cases and the state courts had the same power in each case, then "the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us." *Williams* at 388.[28]

In the case at bar, the Ohio courts have the same type of "discretionary power" through Ohio Criminal Rule 52(B), the "plain error" rule. Under this rule, Ohio courts are empowered to consider errors which were not objected to at trial if those errors affect "substantial rights." This is the primary vehicle to raise substantial issues where there has been no objection.[29]

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[28]An ostensibly similar situation to *Williams, supra* was presented in *Wolfe v. North Carolina*, 346 U.S. 177 (1960). The Court in *Wolfe, citing Williams with approval*, was concerned with the North Carolina Supreme Court's discretion to expand the record before it so as to include material which either party had neglected to transmit for review. In determining whether North Carolina courts had exercised this discretionary power, the Court found that those courts "had consistently and repeatedly held (they) would not make independent inquiry to determine the adequacy of the record before (them) . . ." *Wolfe, supra* at 188. This decision factually distinguished *Williams* by finding that the North Carolina Courts, though possessed with a discretionary power, had *never* exercised that power. In *Williams*, however, Georgia Appellate Courts *had* exercised that discretionary power. Likewise, *Wolfe* does not foreclose inquiry in this case. As established, *infra*, Ohio courts have determined not only that plain error is an available means for review, but that plain error exists in several different settings. Thus, *Williams* continues to be the primary focus for analysis.

[29]The appeals process and the motion for new trial are applicable to errors occurring on the record. Each of these means, however, gives Ohio courts the discretion to hear matters which affect substantial rights, despite the observance of an objection.

In *State v. Long*, 53 Ohio St. 2d 91, 372 N.E. 2d 804 (1978), the Ohio Supreme Court invoked a plain error analysis on precisely the same substantive and procedural questions presented here. The Court did not say that plain error review was unavailable. It simply found that on the facts presented there, the outcome of the trial clearly would not have been otherwise. *Long, supra* at 97. Thus, the Court recognized its discretionary power to review an unobjected-to error but declined to find such error on the facts presented.

Other Ohio Appellate courts have, however, utilized plain error to reach the substantive issue despite a procedural default. In *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1278 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); *State v. Gideons*, 52 Ohio App. 2d 70, 368 N.E. 2d 67 (1977); and *State v. Muscatello*, 57 Ohio App. 2d 231, 378 N.E. 2d 627, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 738 (1978), plain error was used to reach the merits. All three of these reported cases dealt with jury instructions. Thus, each case implicated the same contemporaneous objection interest as manifested here. Yet all three courts found they had the discretion to overlook that interest and indeed exercised that discretion. Similar situations can be found in *State v. Patton*, No. 35579 (8th Dist. Ohio Ct. App., March 3, 1977); *State v. Ballard*, No. 36204 (8th Dist. Ohio Ct. App., May 26, 1977); *State v. Davis*, No. 36142 (8th Dist. Ohio Ct. App., May 5, 1977); *State v. Burke*, No. 354 (4th Dist. Ohio Ct. App., January 30, 1978) (Addendum at 82, 24, 43, and 29, respectively).

These cases demonstrate that in situations involving the same state interest under Criminal Rule 30, Ohio courts have not hesitated to utilize plain error to grant relief. It is evident that the Ohio courts *have* not only had the discretion to review such errors but that they have utilized it. As in *Williams*, it is clear that Ohio courts have exercised plain error "in a proper case."

Various federal courts have recognized this concept and have looked to whether the particular state could utilize a discretionary means of review to reach unobjected-to claims. In *Berrier*, the Court was faced with a burden-shifting instruction on self-defense which had not been objected to. The Court found that the substantive issue could be reached since Michigan had a rule whereby issues of "fundamental injustice" could be considered without an objection. *Berrier, supra* at 522. *See also Krzeminski v. Perini*, 614 F. 2d 121, 123 (6th Cir. 1980) (treating Ohio's "plain error" rule).

The same result was reached in *Harless v. Anderson*, 504 F. Supp. 1135 (E.D. Mich. 1981). There the Court was again concerned with a burden-shifting instruction which had not been objected to. The Court reached the issue on the basis of Michigan's "manifest injustice" rule, CR G (1963) 516-2. The Court held:

> "If the State itself does not require a contemporaneous objection to preserve the issue on appeal, the federal court will not require such an objection." *Harless* at 1138-39.

See also Mitchell v. Smith, 633 F. 2d 1009, 1011 (2nd Cir. 1980):

> "When the State fails to give preclusive effect to their own procedural rules, comity concerns do not require that the federal courts give greater respect to their rules than State's themselves."

Accord, Quigg v. Crist, 616 F. 2d 1107, 1111, n. 4 (4th Cir. 1980); *Carr v. Alabama*, 586 F. 2d 462 (5th Cir. 1978); and *Wallace v. McKenzie*, 449 F. Supp. 802, 806-7 (S.D. W. Va. 1978).

Since the Ohio courts in this case could have exercised their discretion to consider the substantive issue *despite* the procedural default, the federal courts should be able to do no less. This same jurisdiction was used in *Ulster County v. Allen*,

supra. In *Ulster County*, the Court was concerned with whether New York had a contemporaneous objection rule which would bar federal review of the unobjected-to presumption. The Court's analysis dwelt on whether the New York courts could consider such an issue despite the absence of an objection. The Court found that the New York courts had the *discretion* "to consider and determine any question . . . which may have adversely affected the appellant *even if not previously objected to*." *Id*. at 150, n. 8 (emphasis added). Furthermore, the Court found that even if New York had a contemporaneous objection rule, the Court of Appeals had developed a judicial policy of reviewing "unobjected-to errors that affect a fundamental constitutional right." *Id*. at 151, n. 10. Considering the lessened effect New york had given its rule, the Court held:

> "But if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *Id*. at 154.

Since Ohio has not interpreted Criminal Rule 30 to be an absolute bar to review, this Court has the power to do the same and may consider the substance of Respondent's claim.

SECOND. All contemporaneous objection rules are not created equal. The varying interests of both the state and the defendant in any given situation may result in a different judgment as to the "adequacy" of the asserted state grounds for preclusion. For example, the State's interest in requiring objections and maintaining finality is probably the greatest in situations involving guilty pleas. Generally such cases are not as carefully prepared as cases which actually go to trial; it will be difficult to find witnesses after time has transpired; and there will be no transcript of testimony of unavailable witnesses which can be utilized at any subsequent trial as allowed under

Ohio v. Roberts, 448 U.S. 56 (1980). See Westin, "Forfeiture of Constitutional Rights," 75 Mich. L. Rev. 1214, 1237-49 (1977). Nevertheless, guilty pleas are subject to collateral attack because of the fundamental nature of the rights involved.

Like the guilty plea example, the right involved here is a fundamental one. In contrast to the grand jury example, *e.g. Davis v. United States, supra*; and *Francis v. Henderson, supra*, the Respondents here had everything to lose and nothing to gain by "withholding" an objection to the jury instruction. No possible tactical advantage could have been gained by defense counsel's failure to object here or by accepting a higher burden of proof than that required by law. No allegation has been made that any trial counsel even considered the possibility of raising any objection to the jury instruction, let alone that they improperly withheld the objection.[30] To the contrary, counsel for the Petitioners has specifically admitted that no such improper motives should be attributed to trial counsel:

> "To say that Ohio *counsel* and courts had a *justifiable reliance* on past precedent would be an understatement at best." (Petitioner Engle's Petition for Re-hearing *En Banc* in the Sixth Circuit, pp. 4-5) (emphasis added).

Thus, both the fundamental nature of the right involved and the total lack of any conceivable tactical advantage places Respondents' interest in federal habeas corpus review in its highest position.

In contrast, the interests of the state which might, in other circumstances, support a rule of preclusion are not applicable here. The interest of the state in enforcing a contemporaneous objection rule at trial generally fits into three categories: (1) insuring the timely taking of testimony on issues of fact, pri-

[30]If such an allegation had been properly raised, then an evidentiary hearing in the Federal District Court should have been held. *See Jenkins v. Anderson*, 447 U.S. 231, 234, n. 1 (1980); and *Henry v. Mississippi, supra* at 450.

marily relating to the suppression of evidence; (2) preventing "sand-bagging" by trial counsel so as to insure that the trial is the "main event" of the criminal proceedings; and (3) "finality", creating incentive to have a trial that is as error free as possible so as to avoid the necessity of having new trials. See Pets.' Brief at 9; Solicitor General's *Amicus* Brief at 14-15. *See also State v. Childs*, 14 Ohio St. 2d 56, 62, 236 N.E. 2d 545, 549 (1968); and *State v. Williams*, 51 Ohio St. 2d 112, 117, 346 N.E. 2d 1364 (1977), vacated in part on other grounds, *Williams v. Ohio*, 439 U.S. 955 (1978).

The first interest, insuring the timely taking of testimony with respect to preliminary matters such as suppression motions, *e.g., Wainwright v. Sykes, supra*, has no application here at all because the error relates to an erroneous jury instruction. The second interest, in avoiding sand-bagging by trial counsel, appears to be the major concern articulated by the Ohio Courts. *E.g., State v. Childs, supra* and *State v. Williams, supra*. But, upon the facts of these cases, there is no suggestion that counsel could have obtained any tactical advantage by accepting the burden of proof upon the affirmative defense or by "holding" an objective in reserve. Further, given the admission by Petitioners' counsel in the Circuit Court below that any failue to object could have been based upon "justifiable reliance" upon past precedent, it is apparent that this interest is not implicated in the cases at bar.

The third interest, finality, must be examined in the context of the state interest in avoiding retrials. It is evident that the State of Ohio has not sought to create an absolute bar since it allows review of unobjected-to errors upon a plain error standard. Ohio Criminal Rule 52. Equally as important is the statement of the Ohio Supreme Court in *State v. Williams, supra*, indicating that the failure to object would preclude review where:

> ". . . a party complaining of the trial court's judgment *could have called*, but did not call, to the trial court's attention (the error) at a time when such error could have been *avoided or corrected* by the trial court." *Id.* at 117 (citations omitted) (emphasis added).

As developed below in the arguments concerning inadvertence and futility, Ohio trial counsel could not realistically have called the error to the trial court's attention and, even if they had, the trial courts could not reasonably have avoided or corrected the pre-*Robinson* error. Consequently, by its own criteria, the interest of the state is not served here.

This point is made by the only Ohio Court to specifically consider the State's interest in enforcing its contemporaneous objection rule in pre-*Robinson* cases:

> ". . . Rule 30 . . . contemplates calculated risks and tactical choices, and at the same time, guards against nonfeasance and misfeasance. In fact, the rule prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." *State v. Hamilton*, No. 5088 (2nd Dist. Ohio Ct. App., December 9, 1976) at 3 (Addendum at 48, 50) (emphasis added.)

A similar conclusion was reached by the panel decision outlined by Senior Judge Peck in *Isaac v. Engle, supra* at 1126 (A. 30). Given the fact that this conclusion is based upon an interpretation of State law, the decision of the Court of Appeals on this issue may be entitled to preferential consideration. *See* Respondent Hughes' Brief on this point at 16-17.

It is important to emphasize that in the case at bar, unlike the *Davis/Sykes* line of cases, there was no tactical advantage to be gained by withholding the objection and accepting the burden of

proof upon the self-defense issue. Without such an incentive, "it is exceedingly hard to visualize a case where a defendant or his lawyer would deliberately lay aside a meritorious claim so as to raise it after the defendant was jailed." Friendly, "Is Innocence Irrelevant . . . .", 38 U. Chi. L. Rev. 142, 158 (1970). In Ohio even a defendant who must seek vindication from the Ohio Supreme Court can reasonably expect a decision within two years of incarceration. *E.g., State v. Harris*, 58 Ohio St. 2d 257, 389 N.E. 2d 1121 (1979); *State v. Sturm*, 66 Ohio St. 2d 483, ____ N.E. 2d ____ (1981). In Mr. Bell's case six years have now passed and he still has not obtained his freedom. The delay caused by having to pursue federal remedies was so great that both Mr. Hughes and Mr. Isaac have full releases from the state of Ohio even though the litigation continues. Nor are their experiences unique. *E.g., Jones v. Jago*, 428 F. Supp. 405 (N.D. Ohio 1977), *aff'd*, 375 F. 2d 1164 (6th Cir. 1978), *cert. denied* 439 U.S. 883 (1978) (incarceration for over six years).

This prospect of years of additional incarceration gives both the accused and counsel incentive of the greatest possible magnitude to present such claims to the state courts at the earliest opportunity. It insures that the trial will be the "main event" and gives more than adequate protection to the state's interest inducing counsel to attempt to reform the law and to aid the trial court in attempting to produce error-free trials. Any further "sanction" within the context of the case at bar would not only be unnecessary but also grossly disproportionate to the alleged "offense" against the State's procedural rule. Since the State's articulated interest in invoking the contemporaneous objection rule is already adequately protected, *Sykes* has no application here.

B. Application of the Contemporaneous Objection Rule to these Cases would violate Procedural Due Process, Substantive Due Process and Equal Protection

1. Procedural Due Process

It is well established that the "state action" requirements of both the Fourteenth Amendment are met even if that action is taken through the state judicial branch. *E.g., Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Fundamental fairness guaranteed by procedural due process, requires that:

> "In all instances the state must adhere to previousy declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken." Nowak, Rotunda & Young, HANDBOOK ON CONSTITUTIONAL LAW 477 (1978) (emphasis added).

It is conceded that the instructions in these cases erroneously required the respective Respondents to prove that they had acted in lawful self-defense. If the Solicitor General of the United States is correct in his assertion that the right accrued solely from the passage of the statute and not from a change effected by *State v. Robinson, supra*, then procedural due process was violated.

Under this view, the statute — pertaining to the important question of the quantum of proof — was one of the "previously declared rules" which the state must adhere to in adjudicating the claim that these Respondents violated Ohio's criminal statutes. Yet, the instructions to the jury changed the rules; altered the quantum of proof; and thereby prejudiced the accused.

It is quite clear that this action could not have been taken by the legislature, since it would violate the *ex post facto* clause. *E.g., State v. Jones, supra*. The same protection is afforded against such judicial actions by the due process clause. *See* Tribe, *American Constitutional Law* 478 (1978).

2. Substantive Due Process

Fourteenth Amendment due process prohibits state action that is "arbitrary" or "capricious." Stated in other terms, the due process clause requires that state action "have a rational relationship to a legitimate end of government." Nowak, Rotunda & Young, *supra* at 404. As developed in more detail below, *none* of the legitimate interests a state may have are furthered by invocation of the contemporaneous objection rule in the cases at bar. See *Isaac, supra* at 1126 (panel decision); *Isaac, supra* at 1136-37 (Jones J., concurring). This same conclusion was reached by the Ohio Court of Appeals in *State v. Hamilton*, No. 5088 (2nd Dist.Ct. App., December 9, 1976), at 3, in finding that Rule 30

> ". . . prevents any number of possible evils in trial practice, but *none of which are present in this case*. Here, an objection to the instruction on self-defense, even if made at the time of trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added) (Addendum at 50).

Accordingly, the application of Ohio Criminal Rule 30 to any of the cases at bar is not in furtherance of any legitimate state interest and violative of the due process clause of the Fourteenth Amendment.

3. Equal Protection

The Fourteenth Amendment also guarantees equal protection of the law. While the state may create classifications, such classification must be rationally related to the furtherance of some permissible state objection. *See Shapiro v. Thompson*, 394 U.S. 618 (1969). Moreover, when such classification in-

fringes upon a fundamental right, it can be justified only upon a showing of a compelling state interest. *See Shapiro v. Thompson, supra*.

In the interim between *Robinson* and *Humphries*, some defendants whose counsel had *not* objected to the jury instructions nevertheless received new trials. It can be documented that at least five individuals who made no objection at trial but assigned the burden of proof issue as an error on appeal were granted new trials under Ohio's plan error rule.[31] In at least two other cases, the accused obtained leave to file supplemental briefs in the State Court of Appeals raising the claim that the instruction on self-defense had been erroneous and obtained new trials in spite of their failure to object.[32] In *State v. Patton*, No. 35579 (8th Dist. Ct. App., March 3, 1977) (Addendum at 82), the accused received a new trial even though he failed both to object at trial and assign the burden of proof issue on self-defense as error on appeal. This was the result of the Court of

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[31]*State v. Hamilton, supra* (self-defense); *State v. Davis*, No. 36142 (8th Dist. Ct. App., May 5, 1977) (self-defense) (Addendum 43); *State v. Hudson*, No. 35562 (8th Dist. Ct. App., May 17, 1977) (intoxication) (Addendum 56); *State v. Muscatello*, 57 Ohio App. 2d 273, 378 N.E. 2d 738, *aff'd* 55 Ohio St. 2d 201, 387 N.E. 2d 627 (1978) (mansslaughter); and *State v. Gideon, supra* (self-defense).

It is significant to note that in the *Muscatello* case the error was premised on this Court's decision in *Mullaney v. Wilbur, supra*. Even though *Mullaney* was decided on June 9, 1975, the trial in *Muscatello* did not occur until June 23, 1975 (57 Ohio Ap. 2d at 232; 387 N.E. 2d at 631). The state interposed the defense that the accused failed to object. The Court of Appeals found plain error and apparently determined that it was not signigicant that *Mullaney* was decided prior to the date of the trial. The Ohio Supreme Court affirmed this decision without speaking to either of those points.

[32]*State v. Ballard*, No. 36204 (8th Dist. Ct. App., May 26, 1977) (Addendum 24); and *State v. Rivera*, No. 35335 (8th Dist. Ct. App., January 20, 1977) (Addendum 93).

Appeals raising the issue *sua sponte* and finding it to be plain error. In *State v. Burke*, No. 354 (4th Dist. Ct. App., January 30, 1978) (Addendum at 29), involving an affirmative defense pertaining to the carrying of a concealed weapon, the court found reversible error even though there was no timely objection and even though the appellate decision was rendered after both *Robinson* and *Humphries*. Further, in *State v. Campbell*, No. C.A. 1763 (5th Dist. Ct. App., July 25, 1979) (Addendum at 36), another carrying a concealed weapons case, the Court found plain error in the absence of a failure to object on the burden of proof issue even though the trial itself occurred after both *Robinson* and *Humphries*.

The arbitrariness of Ohio's application of both its contemporaneous objection rule and its plain error rule can also be illustrated by other cases in which the plain error rule has been utilized to require a new trial. For example, the Ohio courts have found plain error where a prosecutor attempted to use the defendant's post-arrest silence for impeachment purposes. *State v. Eiding*, 57 Ohio App. 2d 111, 385 N.E. 2d 1332 (1978); where the jury was not specifically instructed on all the elements of the crime, *State v. Bridgeman*, 51 Ohio App. 2d 105, 366 N.E. 2d 1378 (1977), *aff'd* 55 Ohio St. 2d 261, 381 N.E. 2d 184 (1978); and where the prosecuting attorney made improper remarks in argument implying that if the accused were acquitted the pecuniary interest of the jury as taxpayers would be affected, *State v. Hill*, 52 Ohio App. 2d 393, 370 N.E. 2d 775 (1977).

As important as the rights in those cases were, they did not rise to the same magnitude as the shifting of the burden of proof upon an issue that makes the difference between guilt and innocence. It is irrational to recognize plain error in cases such as those set forth above, and to refuse to do so in cases in which the error goes directly to the heart of the truth-finding function of the jury such as Mr. Isaac's.

These cases serve to illustrate that the granting or denial of benefits under *Robinson* had nothing to do with the merits of any individual case and was not governed by any rational scheme. To the contrary, it was a "game of chance" in which some, who were lucky enough to be tried at a certain time or in a certain appellate district, were granted important benefits that were denied to others.

Having failed to meet the rational basis test, it necessarily follows that the state cannot show the compelling state interest required here because the fundamental right of liberty is implicated. Accordingly, the right to equal protection has been violated and the judgment of the Court below should be affirmed.

C. If *Sykes* Were Applied to the Cases at Bar, Respondents Are Within the "Cause" and "Prejudice Standards

1. "Cause or Prejudice"

Though the initial decisions by this Court on procedural defaults seemed to indicate that collateral review would be available only upon a showing of both cause *and* prejudice, there is language in this Court's opinion in *Sumner v. Mata*, ____ U.S. ____, 49 U.S.L.W. 4133, 4135 (1981) suggesting that review would be available if a showing was made of either cause *or* prejudice. Such an approach would be consistent with language in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), *quoted with approval* in *Davis v. United States*, 411 U.S. 233, 244 (1973) indicating that the degree of prejudice was one of the aspects to be considered in determining the existence of "cause." It would also be a separate method of applying a "constitutional plan error rule".

Hence, if *Sumner v. Mata* was intended to establish a

"cause" *or* "prejudice" test, then Mr. Bell submits that his unequivocal showing of prejudice alone should entitle him to relief.

2. Ineffectiveness as Cause

The change in Ohio's approach to the burden of proof may be viewed as having come from R.C. 2901.05 itself, *State v. Robinson, supra* at 110, 351 N.E. 2d at 93; *State v. Humphries, supra* at 101, 364 N.E. 2d at 1357, or from a "gloss" placed upon that statute by *Robinson*. *E.g., State v. Robinson, supra* at 116 (Corrigan, J., dissenting).

Since the right to effective assistance of counsel requires knowing the law, *e.g., People v. Iberra*, 386 P. 2d 478 (Cal. 1963) and that actions taken (or not taken) be a product of professional judgment rather than neglect or ignorance, *Marzullo v. Maryland*, 561 F. 2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978), it necessarily follows that any counsel who either was unaware of the statute's existence or misinterpreted its meaning was ineffective. *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977), Nor would insulation from such ineffectiveness come from the "usual practices" of the profession if such practice simply constituted "mass negligence." *E.g., The T.J. Hooper*, 60 F. 2d 737, 740 (2nd Cir. 1932). This is particularly true in a criminal case where, unlike civil matters, monetary damages cannot make the client whole.

Since ineffectiveness is "cause" under *Sykes, e.g., Sincox v. United States*, 571 F. 2d 876, 879-880 (5th Cir. 1978) and Pets.' Brief at 15, if the right in question is determined to have come from the statute itself then cause has been shown.

3. Futility as Cause

The state's primary interest in enforcing the contemporaneous objection rule is in creating error-free trials. It matters little, in terms of "finality" whether a new trial is the result of a decision by a state appellate court or a federal district court. Whatever the state's interest in having its own appellate courts consider possible errors, that interest is adequately protected by the exhaustion of state remedies requirement. Consequently, the question of whether "futility" can serve as cause under *Sykes* must be resolved by considering its effects upon the state's interest.

At the outset, it is important to emphasize that "futility" is a generic term for at least three different situations. The first of those situations is what Respondent Hughes has termed "futility in fact." (See Resp. Hughes' Brief at 15-21). This type of futility exists when counsel's making or not making an objection has no arguable bearing upon the prospects for avoiding error at trial.

Of course, it will usually be impossible to establish futility with such certitude. But the procedural default principle, like the exhaustion doctrine, is based upon comity. *Compare Sykes, supra* with *Fay v. Noia*, 372 U.S. 391, 418-420 (1963). Just as comity does not require vain acts for exhaustion purposes, neither should it require vain acts for procedural default purposes. In the exhaustion context, the mere "possibility" that a state remedy may be available is not enough to foreclose federal review when such a remedy has not been pursued. *E.g., Collins v. Perini*, 594 F. 2d 592, 593 (6th Cir. 1979) (post-conviction foreclosed by *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E. 2d 104 (1967)).

A similar standard is applicable to the comity requirements under the procedural default rule. Mere speculation as to the possible prevention of error at trial is not enough. Rather, if it

seems reasonably likely that any such objection would not serve this purpose, then "actual" or "practical" futility can be said to exist. A demonstration of "practical futility" would, like futility in fact, indicate both that enforcement of the procedural default rule was not legitimate and that cause existed. *E.g., Myers v. Washington*, 646 F. 2d 355 (9th Cir. 1981); *United States v. Frady*, 636 F. 2d 506, (D.C. Cir. 1980), *cert. granted* ____ U.S. ____, 49 U.S.L.W. 3962 (June 29, 1981).

A determination of whether it was, as a practical matter, futile to object in a given situation could be made by reference to objective indicia of futility. First, consideration should be given to whether the instruction in question was a "standard", well accepted one. This was true in the case at bar. See 4 *Ohio Jury Instructions*, Section 409.60.

Second, reference should be made to the treatment given to identical or similar objections by trial courts at the time. Here there are seven documented cases in which an objection was entered to jury instructions shifting the burden of proof to the accused on "affirmative defenses."[33] In each case the objection was overruled and the jury improperly instructed. One Ohio Appellate Court indicated that it knew of no pre-*Robinson* trial in which the jury had been properly instructed with respect to the burden of proof on affirmative defenses. *State v. Burke*, No. 354 (4th Dist. Ct. App., Pickaway Cty., January 30, 1978) at 7, n. 4 (Addendum 35).

[33]*E.g., State v. Robinson*, 48 Ohio App. 2d 197, 200, 356 N.E. 2d 725, 728 (1975), *aff'd* 47 Ohio St. 2d 103, 351 N.E. 2d 88 (1976) (self-defense, Franklin County); *State v. Matthews*, 47 Ohio St. 2d 119, 351 N.E. 2d 98 (1976) (self-defense, Franklin County); *State v. Long*, 53 Ohio St. 2d 91, 94, 372 N.E. 2d 804, 806 (1978) (self-defense, Summit County); *State v. Slone*, 45 Ohio App. 2d 24, 29, 340 N.E. 2d 413, 418 (1975) (self-defense, Franklin County); *State v. Gideons*, 52 Ohio App. 2d 70, 76-77, 368 N.E. 2d 67, 70-71 (unclear whether proper objections — self-defense, Cuyahoga County); *State v. Johnson*, 11 O. Ops. 3rd 338, 340 (1978) (insanity, Cuyahoga County); *State v. Brewster*, 1 Ohio Ops. 3rd 372, 373 (1976) (self-defense, Franklin County).

Third, consideration should be given to the assessment of the existence of "futility" by those courts which are in the best position to judge the likelihood of an objection producing its desired effect. In the present cases, the Ohio Court of Appeals for the Second District has indicated that such an objection would have been a "vain act." *State v. Hamilton, supra* at 3 (Addendum at 50). An identical conclusion was reached in the panel decision authored by Senior Judge Peck below. *Isaac v. Engle, supra* at 1126 (A. 30).

Fourth. Since appellate courts may, institutionally, be more sensitive to change, their lack of receptiveness to a given legal argument may be an important indication of futility. In Ohio, decisions which conflict with the later Ohio Supreme Court decision in *Robinson* were rendered not only by four appellate courts[34] but also by the State Supreme Court itself. *State v. Rogers*, 43 Ohio St. 2d 28, 330 N.E. 2d 674 (1975), *cert. denied* 423 U.S. 1061 (1976).

These objective indicators all suggest that at the time of the trials of these three Respondents it would, as a practical matter, have been futile to make an objection. Hence, no legitimate state interest is furthered by precluding review of the merits of their habeas corpus claims.

There is, of course, a third type of futility that is the basis for much of the argument in the Solicitor General's brief. That aspect of futility focuses not upon factual or actual futility, but rather upon trial counsel's perception of such futility. The So-

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[34]*State v. Smith*, 49 Ohio App. 2d 388, 361 N.E. 2d 267 (1976) (3rd Dist., insanity); *State v. Jones*, 49 Ohio St. 2d 166, 359 N.E. 2d 1374 (1977) (indicating the Sixth District had incorrectly held the burden of proof could be placed on the accused); *State v. Ladany*, No. 7534 (9th Dist., January 22, 1975) (intoxication) (Addendum at 66); *State v. Morow*, No. 7757 (9th Dist., October 22, 1977) (self-defense) (Addendum at 77); *State v. Slone*, 45 Ohio App. 2d 24, 340 N.E. 2d 413 (1975) (10th Dist., self-defense).

licitor General argues against futility as cause when it is based upon a *judgment* by counsel that it would be futile to raise any such objection.[35] Of course, such an argument is not pertinent to the instant cases, since there is nothing in the record to suggest that any alleged procedural default was based upon the type of decision-making posited by the Solicitor General. *See* note 30, *supra*.

4. Inadvertence as Cause

While ineffectiveness will always be cause, cause can be established short of proving ineffectiveness. Because lack of effective assistance of counsel provides an independent basis for obtaining relief, to "closely equate" (Pets.' Brief at 15) cause and ineffectiveness would be to render *Sykes* a nullity. *Jurek v. Estelle*, 593 F. 2d 672, 683, n. 19 (5th Cir, 1979). Contrary to the claims of the Solicitor General, this does not call for a return to the "deliberate bypass" rule. Rather, it serves to implement the decisions of this Court from *Davis* to *Sykes* which indicate that the contemporaneous objection rule will be given preclusive effect when the failure to object was based upon a tactical or strategic decision made at trial. Indeed, the lower courts have generally applied *Sykes* by distinguishing between situations where the failure to object was a product of tactics and those situations where it was a result of inadvertence

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[35]One by-product of rejecting as cause counsel's reasonable determination that raising an issue would have been futile would be to give incentive to counsel to raise all conceivable errors, no matter how tenuous, in order to protect against future developments in the law. *Myers v. Washington*, *supra*, at 360. This is not only counterproductive but "borders on the absurd." *United States v. Frady*, *supra* at 512 and 513, n. 17.

or neglect or impossibility.[36] This approach seems to have been approved in *Smith v. Estelle*, ____ U.S. ____, 49 U.S.L.W. 4490, 4493, n. 12 (1981) *aff'd* 602 F. 2d 694 (5th Cir. 1979).

Under this interpretation, one aspect of cause is the lack of a firm legal basis upon which to make the objection. *Myers v. Washington, supra* at 359-360; *United States v. Frady, supra* at 512. This Court held that the mere theoretical possibility of obtaining reversal on appeal is not sufficient to require an objection:

> ". . . a failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966).

The lack of an adequate legal basis upon which to make such an objection was set forth in detail in the panel decision in *Isaac v. Engle, supra* at 1126 (A. 29-30). In addition to the factors set forth there, consideration should also be given to the following: (1) the then new statute was "not free of ambiguity", *Isaac, supra* at 1131 (A. 2) and, unlike statutes in other states, did not "expressly" require the prosecution to negate affirmative defenses. *Muscatello, supra* 57 Ohio App. 2d at 249, 387 N.E. 2d at 640; (2) unlike the 1971 Legislative Committee Report cited in *Robinson, supra*, 47 Ohio St. 2d at 110-111, n. 10, 351 N.E. 2d at 93-94, n. 10, the 1974 Committee Notes to R.C. 2901.05 make no reference to a change in the burden of proof; (3) an

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[36] *E.g., Jiminez v. Estelle*, 557 F. 2d 506 (5th Cir. 1977) (counsel ignored grounds for objection or did not comprehend their importance); *Sincox v. United States*, 571 F. 2d 876 (5th Cir. 1978) (ineffectiveness); *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979) ("attorney misfeasance"); *Collins v. Auger*, 577 F. 2d 1107 (8th Cir. 1978), *cert. denied* 439 U.S. 1133 (lack of knowledge of facts or law); *Graham v. Maryland*, 454 F. Supp. 643 (D. Md. 1978) (non-tactical explanation for failure to object); and *Tolliver v. Wyrick*, 469 F. Supp. 583 (W.D. Mo. 1979) (lack of knowledge of necessity for multiple objections).

article on the legislative history of the bill enacting the statute in question, authored by its two co-sponsors, gives no indication of any such change, Norris and Lehman, "Some Legislative History and Comments on Ohio's New Criminal Code," 23 Cleve. St. L. Rev. 8 (1974); and (4) the only pre-*Robinson* article treating this issue concludes that the burden of proof on affirmative defenses remained on the defendant, Comment, "Affirmative Defenses in Ohio After *Mullaney v. Wilbur*," 36 Ohio St. L. J. 828, 829-830 (1975).

Counsel for Petitioner Perini perhaps summed this situation up best when he indicated that "(i)n a real sense" the decision in *Robinson* "was not foreshadowed either by the terms of O.R.C. Section 2901.05 nor interim decisions of the Ohio Supreme Court." (Cert. Pet. at 8.) Relevant to the questions of both inadvertence and futility is the statement of Petitioner Engle that:

> "The decision in Robinson was a *clear break* with practice in Ohio and was not foreshadowed so as to make its result inevitable . . . . *To say that Ohio counsel and courts had a justifiable reliance on past precedent would be an understatement at best*." Petition for Rehearing En Banc in Sixth Circuit at 4-5 (emphasis added).

It was for reasons such as these that the Second District Ohio Court of Appeals concluded that the failure to object to an improper jury instruction prior to *Robinson* was "not based upon nonfeasance, misfeasance, or any tactical choice." *State v. Hamilton*, No. 5088 (2nd Dist. Ct. App., Dec. 24, 1976) (Addendum at 53).

What the Petitioners seek here is to set a higher standard of legal scholarship for the practicing bar than the Ohio Courts exercised when acting in their official capacity. In effect, the State of Ohio faulted trial counsel, and made clients suffer for that fault, when trial counsel either made no error, or, at the very

least, did nothing more than make the very same mistake that the State Supreme Court had made in *Rogers*.

Consequently, any failure to object to a jury instruction prior to *Robinson* was not the product of a strategic or tactical choice. Indeed, it was not the product of any choice at all. Rather, it was based upon a lack of information upon which to base the objection and constituted "cause" under *Sykes*.

5. Prejudice

The second prong of the *Sykes* test is "prejudice." As developed fully in the preceding discussions concerning the constitutional magnitude of the error and the doctrine of constitutional plain error, there can be no question that the error here was prejudicial. Whether the burden of proof standard was adopted by the State as a matter of state law or of constitutional requirement, the fact remains that the jury was misinformed as to the burden of proof upon the crucial matter which made the difference between guilt and innocence. Both the Ohio Supreme Court and the Federal Circuit Courts have recognized that such an error is prejudicial. *E.g.*, *State v. Chase*, 55 Ohio St. 2d 237, 243, 378 N.E. 2d 1064, 1068 (1978) and *Berrier v. Egeler*, 583 F. 2d 515 (6th Cir. 1978), *cert. denied* 439 U.S. 955 (1978). To suggest that no prejudice occurred in Mr. Bell's case is to blink at reality.

CONCLUSION

In the cases at bar, the jury was given improper instructions which shifted the burden of proof upon the major factual issue in dispute: self-defense. The "fault" for this error may lie with a number of individuals: perhaps the Legislature itself was at fault for not making its statute so clear that courts would not misun-

derstand their meaning; perhaps the Legislative Committee was at fault for failing to indicate in the notes to the code that this was a change when the new criminal code was enacted in 1974; perhaps the Ohio Judicial Conference was at fault for failing to revise their model jury instructions to conform to the new code; and perhaps the Ohio Supreme Court itself was at fault for setting forth its *dictum* in *State v. Rogers, supra*, which was later contradicted by *State v. Robinson, supra*. But to whomever the "fault" is attributed, it is clear that the confusion and the error was caused by the State of Ohio, acting either through its Legislature or its Courts. This is true even at the time of the trial — for Ohio Revised Code Section 2945.11 specifically enjoined the Court to correctly charge the jury upon "all matters of law necessary . . . in giving its verdict . . . ."

In spite of the fact that the error here was created by the State and injected into the trial by the State, the State of Ohio insists that the unfair trials should stand. When stripped to its essence, the argument of the State is nothing more than a claim that they repeated the error so many times (and thereby possibly convicted so many innocent individuals) that they cannot conveniently correct the mistake. The answer to this type of argument was aptly set forth in a different context some 160 years ago:

> "Then where is the justice of the law, and where is its boasted humanity? And for what good and purpose is it, that the arm of the law should be lengthened to strike the fatal blow, but made too short to save an unfortunate victim who is unjustly doomed to suffer? It is enough to ask the question, and every heart will respond that it should not be so." *Bob v. State*, 10 Tenn. 173, 177 (1826) (Haywood, J.).

Fortunately, this Court, acting under its authority to enforce the Fourteenth Amendment has the power to insure that it shall "not be so," by affirming the decision of the *en banc* panel below.

Respectfully submitted,

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